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Chua See Chin v The Director Ministry of Domestic Trade, Cooperative and Consumerism & Anor

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HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12A-14/12 OF 2013
RHODZARIAH BUJANG J
14 FEBRUARY 2014

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Civil Procedure — Mode of commencement — Originating summons — Applicant filed originating summons ('OS') for court to order first respondent to refund proceeds of sale of diesel seized under Control of Supplies Act 1961 ('Act') — Court moved to grant order pursuant to three sections of the Criminal Procedure Code ('the CPC') — Whether mode employed by applicant wrong — Whether applicant should have sought redress under criminal law — Whether reliance upon CPC provisions unnecessary when s 12(1)(a)(ii) of the Act dealt specifically with matter in question — Whether authority's power to sell seized article under Act only arose after decision to institute criminal proceedings against defaulter had been made and not when such decision was pending

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Suspecting that the appellant had unlawful possession of diesel, a controlled item under the Control of Supplies Act 1961 ('the Act'), the first respondent seized the same and carried out investigations under s 21 of the Act. Under s 12 of the Act, if a decision was taken to institute criminal proceedings against the appellant, the first respondent could, inter alia, either retain the controlled article or the proceeds of its sale until the proceedings were concluded. If it was decided that no criminal proceedings would be instituted, the controlled article or its value (less expenses incurred by the first respondent in taking possession, storing and restoring possession of same) was to be returned to the owner. The first respondent sold the diesel seized from the appellant for RM30,380 but failed to institute any criminal proceedings against him for more than seven months. By way of an originating summons filed in the sessions court, but moving the court pursuant to the provisions of ss 406A, 407 and 413(1) and (2) of the Criminal Procedure Code ('the CPC'), the appellant sought an order that the RM30,380 be returned to him. The sessions court dismissed the application resulting in the instant appeal.

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Held, dismissing the appeal:

(1) The filing of the civil claim by the appellant was wrong in law. The seizure of the diesel and the investigation into the appellant's alleged unlawful possession of same were criminal in nature. But given that he had merit in his claim, he was given liberty to file a criminal application for the return

of the proceeds of sale of the diesel if no criminal proceedings were instituted against him in the interim period (see para 8).

(2) The appellant was not without legal redress under criminal law that he had to resort to filing the originating summons. He could have filed a criminal application by way of notice of motion supported by affidavits for the return of the seized diesel before it was sold or the money in lieu if it had been sold. This was because s 12(1) of the Act, in particular, subs (1)(a)(ii) specifically provided for the matter without need to rely on the provisions of the CPC even though there was no apparent conflict between the provisions in the two laws pertaining to the seized diesel. To interpret otherwise would lead to an absurd situation where parties could pick and choose which provision and what statute to follow, or worse, render otiose s 12 of the Act (see paras 3 & 7).

(3) Under s 12(1)(a)(ii) the intention to give the controller of supplies power to sell the controlled article was only after a decision to institute criminal proceedings had been made but not when such a decision was pending. That intention was made even clearer by the provision in that section that the controller was to keep the proceeds of sale until the criminal proceedings were over (see para 4).

[Bahasa Malaysia summary

Mencurigai yang perayu memiliki diesel secara tak sah, barang terkawal di bawah Akta Kawalan Bekalan 1961 ('Akta'), responden pertama merampasnya dan menjalankan siasatan di bawah s 21 Akta. Di bawah s 12 Akta, jika keputusan diambil untuk memulakan prosiding jenayah terhadap perayu, responden pertama boleh, antara lain, sama ada mengekalkan barang terkawal atau keuntungan jualannya sehingga prosiding berakhir. Jika ia diputuskan bahawa tiada prosiding jenayah akan dimulakan, barang terkawal atau nilainya (tolak perbelanjaan yang ditanggung oleh responden pertama untuk mengambil milikan, menyimpan dan memulangkan milikannya) adalah untuk dipulangkan kepada pemilik. Responden pertama menjual diesel yang dirampas daripada perayu untuk sejumlah RM30,380 tetapi gagal untuk memulakan apa-apa prosiding jenayah terhadapnya untuk lebih daripada tujuh bulan. Melalui saman pemula yang difailkan di mahkamah sesyen, tetapi berpindah mahkamah berikutan peruntukan ss 406A, 407 dan 413(1) dan (2) Kanun Tatacara Jenayah ('KTJ'), perayu memohon perintah bahawa RM30,380 dipulangkan kepadanya. Mahkamah sesyen menolak permohonan mengakibatkan rayuan ini.

Diputuskan, menolak rayuan:

(1) Pemfailan tuntutan sivil oleh perayu adalah salah dari segi undang-undang. Perampasan diesel dan siasatan ke dalam milikan diesel tak sah perayu yang didakwa adalah bersifat jenayah. Tetapi dengan merit

di dalam tuntutannya, dia diberi kebebasan untuk memfail permohonan jenayah untuk pemulangan keuntungan jualan diesel jika tiada prosiding jenayah dimulakan terhadapnya dalam tempoh interim (lihat perenggan 8).

(2) Perayu bukan tanpa pembelaan undang-undang di bawah undang-undang jenayah yang dia terpaksa mengambil jalan keluar dengan memfailkan saman pemula. Dia boleh memfailkan permohonan jenayah melalui notis usul yang disokong oleh afidavit-afidavit untuk pemulangan diesel yang dirampas sebelum ia dijual atau wang sebagai ganti jika ia dijual. Ini adalah kerana s 12(1) Akta, terutamanya, subseksyen(1)(a)(ii) secara khusus memperuntukkan untuk perkara tersebut tanpa keperluan untuk bergantung ke atas peruntukan KTJ walaupun tidak terdapat pertikaian yang jelas di antara peruntukan-peruntukan dalam kedua-dua undang-undang berkaitan diesel yang dirampas. Untuk mentafsirkan sebaliknya akan membawa kepada keadaan yang tidak masuk akal di mana pihak-pihak boleh memilih peruntukan dan statut apa untuk ikuti, atau lebih teruk, menyebabkan s 12 Akta lewah (lihat perenggan 3 & 7).

(3) Di bawah s 12(1)(a)(ii) niat untuk memberi pengawal bekalan kuasa untuk menjual barangan terkawal adalah hanya selepas keputusan untuk memulakan prosiding jenayah telah dibuat tetapi bukan apabila keputusan sedemikian masih belum didengar. Niat tersebut dibuat dengan lebih jelas lagi oleh peruntukan dalam seksyen tersebut bahawa Pengawal hendaklah menyimpan keuntungan jualan sehingga prosiding jenayah tamat (lihat perenggan 4).]

Notes

For cases on originating summons, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5967–5980.

Cases referred to

Folin & Brothers Sdn Bhd v Wong Foh Ling & Wong Swee Lin & Ors [2001] 2 MLJ 23; [2001] 1 CLJ 604, HC (refd)

Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63, SC (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 2 CLJ 713, CA (refd)

Mohamad Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82, SC (refd)

PP v Chew Siew Luan [1982] 2 MLJ 119; [1982] CLJ 354, FC (refd)

Legislation referred to

Control Supplies Act 1961 ss 12(1), (1)(a)(ii), 21
Criminal Procedure Code ss 406A, 407, 413(1), (2)

Francis Teron Kadap (Thomas, Shankar Ram & Co) for the appellant.
Mohd Taufik bin Mohd Yusoff (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang J:

[1] I start this judgment by first making it clear that this is a civil appeal, against the decision of the learned sessions court judge who refused to order the return of the price of diesel seized from the appellant (the plaintiff in the sessions court), that was sold for RM30,380 after its seizure by the first respondent. It was made by way of an originating summons but under ss 406A, 407 and 413(1) and (2) of the Criminal Procedure Code. The seizure of the diesel, a controlled item under the Control Supplies Act 1961 and the investigation into the appellant's alleged unlawful possession of the same under s 21 of the said Act were of course criminal in nature. Mr Mohd Taufik bin Mohd Yusoff for the respondents in his written submission at the appeal hearing before me raised, as his last point, the separate jurisdiction of the civil and criminal courts as explained by the Supreme Court in *Government of Malaysia v Lim Kit Siang; United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ Rep 63. At p 27 (MLJ); p 76 (CLJ) the court held as follows:

> As stated previously the basis of the respondent's application for declaration is the allegation of corrupt practice by the Prime Minister and the two Ministers. VC George J in the court below admirably dealt with the legal as well as factual aspects of the offence pertaining to the negotiation and formation of this contract and he finally came to the conclusion that there were issues to be tried. But the question is; are these issues, which are in no uncertain term allegedly criminal, to be tried in a civil court by the civil process? *Is the respondent's application not an invitation to the civil Court to exercise criminal jurisdiction?*
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> In *Gouriet*'s case the House of Lords was confronted with similar questions. *The House refused to allow the enforcement of criminal law by a civil Court*. Lord Diplock reminded the House of the importance of keeping a difference 'between private law and public law' meaning, in the context of that case, civil law and criminal law. In the words of Lord Diplock 'it is the failure to recognise this distinction that has ... led to some confusion and an unaccustomed degree of rhetoric in this case'. I accept this approach in view of the separation of the system of criminal justice from that of the civil justice system. *It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's power to grant that remedy is only at the discretion of the court*. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the attorney general is the guardian of public interest and as

A the public prosecutor, he, not the court, is in control of all prosecutions. How can a prosecution of this nature be done behind his back? These are some of the most serious objections to the exercise by a civil court of its discretionary power relating to declaratory and injunctive remedies. Our system requires the public to trust the impartiality and fair-mindedness of the attorney general. If he fails in his duty to B exhibit this sense of fairness and to protect public interest of which he is the guardian, the matter can be raised in Parliament or elsewhere. (Emphasis added.)

[2] The poser made and answered in the above quotation on the trial by a civil court of a criminal matter is more than appropriate in this case, given, as C I have stated at the outset of this judgment that it was made under the three sections of the Criminal Procedure Code.

[3] Further, it is not that the appellant was without a legal redress under criminal law that he had to resort to filing the originating summons. He could D have filed a criminal application by way of a notice of motion supported by affidavits for the return of firstly, the seized diesel before it was sold or the money in lieu of it since it was sold, for if he had, he would have a whisker of a chance, in my view, to obtain the order. The reason for saying this has got to do with the provisions of s 12(1) of the said Act, in particular sub-s (1)(a)(ii). E The full s 12(1) is reproduced below, given its importance to this case:

Action after taking of possession.

12.(1) Where, under section 11, possession has been taken of any controlled article, then:

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1 Where, under section 11, possession has been taken of any controlled article, then:

(a) *if it is decided to institute criminal proceedings against any person in respect of an offence against this Act involving the controlled article*, the controller may

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(i) retain the controlled article until the conclusion of those criminal proceedings and, except where the court orders confiscation thereof under section 26, shall dispose thereof in such manner as the court may order; or

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(ii) *order that the controlled article be sold in such manner as will secure a reasonable price for it in the circumstances, and the proceeds of sale shall be kept until the conclusion of those criminal proceedings* and, except where the court orders confiscation thereof under section 26, shall be disposed of in such manner

I as the court may order; (Emphasis added.)

(b) if it is otherwise decided, the controller shall either restore possession to the owner or, instead of restoring possession, pay to the owner of the controlled article the maximum price fixed by any written law in respect of the controlled article or,

if no maximum price has been so fixed, the market price of the controlled article, less an amount not exceeding twenty-five per centum of the maximum price or market price, as the case may be, being the expenses certified by the controller to have been incurred by him in taking possession, storing and restoring possession of the controlled article as aforesaid.

[4] Mr Francis Teron Kadap for the appellant submitted, as per the memorandum of appeal, that the selling of the seized diesel was premature because, and this was not disputed, the appellant has yet to be charged in court for its possession. That was more than seven months ago, the seizure having been done on 18 June, 2013. It was premature, he said because the governing words and pre-condition to the power to sell the seized diesel under the said s 12(1)(a) are as emphasised earlier 'if it is decided to institute criminal proceedings against any person …'. Mr Mohd Taufik bin Mohd Yusoff in para 8 of his written submission candidly admitted that learned deputy public prosecutor has yet to make a decision whether to charge the appellant for possession of the diesel. That being the case, I would surely have to agree with Mr Francis Teron Kadap that the operative words in s 12(1)(a)(ii) as quoted and highlighted have not been satisfied. The words of that sub-s are plain and simple enough and their meaning unambiguous. It is trite law that in interpreting a statute, the court must give effect to the words used in their natural and ordinary meaning and this is made clear by the Supreme Court in *Mohamad Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 when it held that where the words of a statute are clear there is no room for the court to go beyond the expressed language of the statute. When I further examined s 12(1)(a)(ii), the intention to give the controller the power to sell the controlled article only after a decision to institute criminal proceeding has been made but not when such a decision is still pending is even clearer because under that provision he is to keep the proceeds of the sale until the criminal proceeding is over. Although I have embraced this view point, I am still minded, as a closure to this judgment to just record my thinking on another point raised in the memorandum of appeal and in both counsels' written submission. That point is on whether the three sections of the Criminal Procedure Code should apply in respect to the controller's power to deal with the seized diesel or just s 12 of the said Act.

THE LEGAL MAXIM

[5] There is a legal maxim which applies to exclude the operation of the said relevant sections in the Criminal Procedure Code on disposal of exhibits or property seized in which a criminal offence has been or is suspected to be committed. The three sections of the Criminal Procedure Code provide for the

matter quite exhaustively and for which I need not elaborate further except to say that they cover situations before, during or after a trial of an offence.

[6] Mr Mohd Taufik bin Mohd Yusoff has put forth a well-reasoned and researched submission to say that the legal maxim of *generalibus specialia derogant* excludes the operation of the said Criminal Procedure Code provisions. The maxim simply means that where a written law has specifically provide for a matter, that will override the general provisions respecting it. The specific provision takes precedence, said Abdul Malik J (as His Lordship then was) in *Folin & Brothers Sdn Bhd v Wong Foh Ling & Wong Swee Lin & Ors* [2001] 2 MLJ 23; [2001] 1 CLJ 604 at p 623 and His Lordship quoted many case authorities to support the application of maxim, including the Court of Appeal's decision in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 2 CLJ 713 and that of Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119; [1982] CLJ 354. The last case being a criminal case, it would be apt to quote excerpt of that judgment here as it appears in Mr Mohd Taufik bin Mohd Yusoff's written submission:

> *Generali bus specialia* derogant is a cardinal principle on interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law.

[7] The application of the maxim to the facts of this case would, in my view, produce both a rational and sensible result and provides for a systematic enforcement of controlled articles even when there is no apparent conflict between the provisions in the two laws pertaining to the seized diesel. To interpret otherwise would lead to an absurd situation where parties can pick and choose which provision and under which statute to follow or worst render otiose s 12 of the said Act. Surely it is not the intention of, and neither should Parliament be allowed to legislate in vain.

[8] However, for the reason I held earlier, that the filing of this civil claim is wrong in law, I would dismiss the appeal but given that I find for the appellant on the merit of their claim, they are given liberty to file a criminal application for the return of the proceeds for the sale of the diesel if there is still no criminal proceedings instituted against him in the interim period. Since the issues are basically resolved in both their favours, I order that each party bear their own cost in this appeal as well as and in the sessions court.

Appeal dismissed.

Reported by Ashok Kumar